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Colorado Supreme Court Decisions

Dicta Editorial Board

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(EDITOR'S NOTE.—It is intended to print brief abstracts of the decisions of the Supreme Court in the issue of Dicta next appearing after the rendition thereof. In the event of the filing of a petition for rehearing, resulting in any change or modification of opinion, such will be indicated in later digests.)

ATTORNEY FEES—CONTRACT FOR—NOT SEVERABLE—NO. 12,577—*Mutter vs. Burgess and Adams. Decided June 23, 1930.*

Facts.—The plaintiffs, a law firm, were employed by the defendant to defend him in an Alienation of Affections suit. The written contract of employment provided for a retainer of $1,000. Of this amount, $200 had been paid, and this suit was brought for the balance. Before the determination of the Alienation of Affections suit, the defendant accused the plaintiffs of selling him out, and he also made other similarly violent remarks concerning the plaintiffs' conduct in the case. The plaintiffs promptly withdrew, and brought this action on the contract. The question presented is whether an attorney, who has withdrawn from a case before he has fully performed his contract, can recover his full fee. The trial court gave judgment for the plaintiffs.

Held.—(1) In withdrawing, they did what any self-respecting lawyers would have done.

(2) Defendant's contention that the plaintiffs could not sue on the contract, but should have sued on a quantum meruit, or for damages for the breach of the contract was without merit. Contracts of attorneys are exceptions to the rule that an "employe can recover only the difference between what he received or might have received from others and the price agreed upon."

"One reason for the exception is that such service is not easily partible or apportioned to the time or the labor performed or to be performed by the attorney. Another reason is that often the most difficult and valuable services of the attorney to his client are rendered in advising him of his legal rights before any papers are prepared or appearances made in court. Another is that by the contract the attorney loses the possible opportunity of employment by the adversary party."

Judgment Affirmed.

ACCIDENT INSURANCE—BODILY INJURIES—EVIDENCE—NO. 12263—*Bickes vs. The Travelers Insurance Company—Decided April 14, 1930.*

Facts.—Margaret Bickes brought this action against The Travelers Insurance Company for $10,000 on an accident insurance policy issued to her husband, Roy W. Bickes. The evidence showed that plaintiff and the decedent had been married for six years; that decedent was in good health; that on October 1, 1927, he was in Trinidad, Colorado on business and telephoned plaintiff saying that he would be home in a few days; that about a week later he came home with a bump on his forehead, elbows badly skinned, clothes soiled, etc. The attending physician testified that decedent was irrational; that he had an abrasion on the forehead which was, in his opinion, the result of an external cause. Other physicians testified similarly. At the end of the plaintiff's testimony the trial court granted a nonsuit.

Held.—The evidence was sufficient to go to the jury, and it was proper to admit the testimony of the physicians that in their opinion the injuries resulted from an external cause.

Judgment Reversed.

CANCELLATION OF DEED—CONDITIONAL DELIVERY—EVIDENCE—NO. 12,258—*The American National Bank, Administrator, Substituted for Mary E. Elwood, Deceased, vs. John L. Silverthorn—Decided April 28, 1930.*

Facts.—Mary E. Elwood, during her lifetime lived with her daughter, Martha, and Martha's husband, the defendant here. In 1919 Elwood executed a warranty deed purporting to convey to Martha certain real property. Thereafter Martha conveyed to defendant here. A little later Martha died and Elwood began this suit to set aside both the deed from her to Martha and the deed from Martha to defendant, alleging that the deed from her to Martha was delivered conditionally with the express agreement that delivery was not to become effective until Elwood's death, and then only in case Martha survived her. The complaint also alleged that defendant knew the conditions of the delivery. The trial court found, as a matter of fact, that the delivery from Elwood to Martha was

not conditional, and judgment was entered in favor of defendant.

Held.—There is sufficient evidence to support the judgment of the lower court which, therefore, will not be disturbed.

Judgment Affirmed.

CRIMINAL LAW—NO. 12368—*People vs. Mooney. Decided June 23, 1930.*

Facts.—The defendant was charged with violation of Sec. 3740 C. L. 1921 which provides that:

"This chapter shall extend to and include all theatres, circuses and shows, where an admission fee is charged for entrance thereto. No person shall be allowed by virtue of any such license to open any place of public amusement, such as a theatre, circus or show, on the Sabbath or Lord's day; but any person who shall so offend on such a day shall be fined in a sum * * *."

The case was tried on an agreed statement of facts and the court dismissed the action.

Held.—"We would be violating one of the well recognized rules of construction if we held that the statute applies to those who fail to procure a license as well as to the licensees, because the language used in the statute itself is applicable to those only who procure licenses, and those who violate other provisions of the statute by failing to procure a license, might open their theatres on the Sabbath or Lord's day, without fear of punishment. This leads to a ridiculous and absurd conclusion, amounting to punishment for one who honestly endeavors to comply strictly with every provision of the statute, and a reward to the one who violates it.

"Before the defendant can be adjudged guilty, it is incumbent upon the People to specify some particular act committed in violation of a public law, either forbidding or commanding it. The statute under consideration does not forbid the opening of a theatre on the Sabbath or Lord's day, and the defendant has not violated any express provision of the statute. We are unable to determine exactly what the legislature intended in passing this section of the statute, with a violation of which this defendant is charged. The statute under consideration is indefinite, uncertain and ambiguous; * * *"

CRIMINAL LAW—PRIOR CONVICTION—EVIDENCE—NO. 12350—*Noble O. Hamilton vs. The People of the State of Colorado—Decided April 21, 1930.*

Facts.—The evidence indicated that defendant Hamilton was engaged with others in a confidence game whereby it was

attempted to defraud a savings and loan company of a large sum of money. Defendant brought error alleging that he was convicted on the uncorroborated testimony of an accomplice and also on the ground that it was improperly brought out at the trial that defendant and one Stone had been in the penitentiary at the same time.

Held.—1. There is no rule that one accused of a crime may not be convicted on the uncorroborated testimony of an accomplice. 2. There was evidence indicating that defendant and Stone had conspired in the penitentiary to work out this fraud and it was, therefore, proper to show that they were both in the penitentiary.

Insofar as this opinion is contrary to the decision in Ryan vs. People, 66 Colorado 208; 180 Pacific 84, the earlier case is overruled.

Judgment Affirmed.

DEFAULT JUDGMENTS—PETITION TO SET ASIDE—GROUNDS FOR—NO. 12,514—*Connell vs. Continental Casualty Company et al. Decided June 23, 1930.*

Facts.—One Cunningham was granted compensation by the Industrial Commission against Connell and the Casualty Company. The Company sought a review in the District Court. Though properly served, Connell failed to appear and judgment was entered against him by default. The District Court held that the insurance policy did not cover Cunningham's injury, and the Commission was directed to dismiss as to the Casualty Company. The policy covered only those employees of Connell that worked in his home in Denver. Cunningham was injured while building a cabin for Connell at Indian Hills. Connell had been told by the insurance agent that he was covered on his risk at Indian Hills before the work was begun there. However, the proper entry had not been made on the records of the Company. Connell, by this action, seeks to set aside the default judgment, and his petition to set aside was denied.

Held.—Without deciding what relief Connell has against the Casualty Company because of the unkept promise of its agent,

(1) "Applications to vacate default judgments are addressed to the sound discretion of the trial court,"

and its decision will only be set aside when that discretion has been abused.

(2) "To entitle a party to have a default judgment set aside for the reasons assigned in this case, it must appear, not only that the default and judgment were obtained by fraud, mistake, inadvertance, or excusable neglect, but that *prima facie* there is a meritorious defense."

Judgment affirmed.

DIRECTED VERDICT—ERROR WHEN—NO. 12,197—*Sherman Mercantile Company vs. Mountain Ice and Coal Company and The Jagger Produce Company. Decided June 23, 1930.*

Facts.—Action to recover the possession of eggs which were stored by the plaintiff. The action was dismissed as to the Mountain Ice and Coal Company by stipulation. The plaintiff's evidence showed that the defendant secured merchandise consisting of 327 cases of eggs, after having procured a merchandise order in favor of one Richards, from one Davidson, an employe of the plaintiff who, at the time, stated that he had no authority to sign for the plaintiff. Previously, the defendant had secured two orders from Richards, who was indebted to the defendant, for the delivery of 51 cases of eggs which were in storage for Richards. These two orders were left blank so that the defendant could take them in such quantities as they might wish. Defendant then used one of the orders given him by Richards (for the 51 cases owned by Richards) and made it out for the 327 cases for which the unauthorized order to Richards from the plaintiff provided. Defendant then gave Richards credit on his account for the 327 cases. The entire transaction was repudiated by the plaintiff and by Richards when they learned of it, and the warehouse was given instructions not to turn the eggs over to the defendant. Plaintiff then brought this action and the court directed a verdict for the defendant.

Held.—"There was ample evidence to carry the case to the jury. It was the province of the jury to pass upon the credibility of the witnesses and the weight to be given to the testimony."

Reversed.

LANDLORD AND TENANT—PURCHASE OF TAX CERTIFICATE—INJUNCTION—NO. 12,225—*Louis Werner vs. Eugene A. Norden, et al—Decided April 28, 1930.*

Facts.—Werner, the owner of the fee title to a lot in Cripple Creek, brought an action alleging that Norden was his tenant; that defendant Sennett conspired with Norden to secure the assignment of a tax sale certificate, and thereby to obtain for Norden a tax deed to the lot. The complaint prayed for an injunction against the County Treasurer to prevent him from issuing such tax deed, and offering to pay the amount due under the tax sale certificate. The defendants' answer made no proper denials of the pertinent facts in the complaint. After the filing of the complaint, before the trial of the cause, the Treasurer issued the tax deed to Sennett. The lower court refused to grant plaintiff the relief which he prayed for on the ground that the tax deed had already been issued at the time of the trial, and that the question attempted to be litigated by the plaintiff was moot.

Held.—A tenant may not either alone or in conspiracy with any other person obtain the paramount title to land which he holds in his capacity as tenant. The issuance of the tax deed after the institution of the suit did not render the question moot, but, on the other hand, such deed was of necessity subject to the result of the litigation which had been started. The plaintiff, therefore, was entitled to his injunction.

Judgment Reversed and Remanded with Instructions.

MALPRACTICE—EXPERT TESTIMONY—EVIDENCE—NO. 12218—*Daly vs. Lininger—Decided April 7, 1930.*

Facts.—Daly, plaintiff below, sued Lininger, defendant below, for damages for malpractice. The testimony shows that Lininger operated on plaintiff's jaw; that during the operation there was a hemorrhage causing such a flow of blood that Lininger could not see clearly what he was doing, and as a result the left inferior dental nerve was severed. The lower court instructed the jury among other things, that the question of whether Lininger had used reasonable skill and diligence should be decided only from a preponderance of the evidence

of the *expert* witnesses. The plaintiff objected to this instruction and asked the court to instruct the jury that this was one of the class of cases in which the jury should be guided by the common experience of mankind as well as by the testimony of experts. Defendant also counterclaimed for the reasonable value of his services, but the plaintiff in her replication denied that there was anything due on account of such services. The lower court directed a verdict for defendant on the counterclaim and the jury returned a verdict in favor of the defendant on plaintiff's complaint for damages.

Held.—The lower court erred in instructing the jury, and the question of negligence should not be determined solely by the testimony of expert witnesses. It was also error to direct a verdict for the defendant on the cross complaint when the pleadings showed that the plaintiff had denied that there was anything due.

Judgment Reversed and a New Trial Ordered.

MINOR'S CONTRACTS—AGENT—JOINT CONTRACT—NO. 12266 —*Bessie M. Sipes vs. L. E. Sipes, et al—Decided April 21, 1930.*

Facts.—Daisy W. Sipes, the owner of a note and deed of trust executed by Bessie M. Sipes, died leaving as her heirs at law the defendants, L. E. Sipes, et al. The plaintiff sued L. E. Sipes individually and all of the defendants as heirs at law, setting forth that they were the owners of the note; that plaintiff agreed with L. E. Sipes as administrator and as agent for the other defendants that the note and trust deed were to be returned to plaintiff and that plaintiff was to convey the land secured thereby to defendants. It appears that two of the defendants are minors. The complaint prayed that if it should be found that L. E. Sipes was the agent for the other defendants, a reconveyance of the realty should be ordered. If it should be found that he was not such agent, complaint prayed for damages against him individually. The lower court sustained the demurrer to the complaint.

Held.—The demurrer was properly sustained. To reconvey was a joint obligation. The minors involved could not be bound through a supposed agent, therefore, none of the

defendants could be bound. There is no cause of action here against L. E. Sipes personally as an agent acting beyond the scope of his authority in presuming to deal for the minors because there is no statement in the complaint that the plaintiff was ignorant of the minority of two of the defendants.

Judgment Affirmed.

NEGLIGENCE—PERSONAL INJURY—PROXIMATE CAUSE—NO. 12262—*Stout, an infant, by O'Connell, his next friend vs. Denver Park and Amusement Company—Decided April 14, 1930.*

Facts.—The plaintiff, aged 19, was riding in a roller coaster car belonging to defendant. Plaintiff testified that during the course of the ride he was struck on the head by some unknown object. He was not strapped in the car at the time. He fell out of the car, was dragged along the track and finally managed to get back into the car. In the course of the fall he suffered an injury and brought this action to recover damages from the defendant company alleging that its failure to see that he was strapped in the car was the proximate cause of the injury. The lower court entered a directed verdict for the defendant.

Held.—In the absence of conflicting testimony, the determination of the proximate cause was for the court. Defendant's failure to see that plaintiff was strapped in the car was not the proximate cause, either alone or in conjunction with the blow which plaintiff received on the head.

Judgment Affirmed.

PERSONAL INJURY—NEGLIGENCE—ASSUMPTION OF RISK—NO. 12386—*Denver and Salt Lake Railway Company vs. Lombardi—Decided April 21, 1930.*

Facts.—Lombardi brought this action for damages alleging that he was a foreman for the Denver and Salt Lake Railway Company; that certain blasting operations were being carried on; that he stationed one Quintano to warn him of the fall of any rocks; that Quintano did not warn him of the fall of a rock which struck him and injured him. Quintano and

another laborer both testified that Quintano had shouted at the approach of the rock which injured plaintiff. Defendant alleged that plaintiff had assumed the risk incident to the operations in which he was engaged at the time of the accident.

Held.—Under the facts in this case the risks were not assumed because they were not fully known and appreciated.

Judgment Affirmed.

PUBLIC UTILITIES COMMISSION—FINDING OF FACT BY—ANTI-DUPLICATION ACT—NO. 12,254—*Utilities Commission et al vs. City of Loveland.*

Facts.—This action is actually between the City and the Public Service Company, each of which claims the exclusive right to furnish certain territory adjacent to the City with electricity. Under the socalled anti-duplication law, the Company filed a petition complaining that the defendant was in the course of constructing an electric line over territory already occupied by the Company. The City answered that no certificate was necessary because the territory in dispute was contiguous to its own lines, and was not already served by the Company. The Commission sustained the Company's petition and upon certiorari, the Commission's ruling was reversed by the District Court, and the petition was dismissed. The Commission prosecuted a writ of error to review the decision of the District Court.

Held.—"To sum up, we cannot say that the Commission was not justified in its findings of fact and its orders and judgment based thereon. We are not to be understood as saying that the Public Utilities Commission has unlimited and unrestricted power in making findings of fact and in entering orders and decrees. It is sufficient to say in this case that no constitutional or statutory provisions have been violated by the Commission and that the evidence before it fully justified the orders which it made, and that the District Court either in a Code writ of *certiorari* or by the writ of review provided by the Utilities act, if there is any difference between them, was not justified in its judgment setting aside the orders of the Utilities Commission."

Reversed and remanded.

PLEADINGS—AMENDED COMPLAINT—EFFECT OF—RIGHT TO FILE—NO. 12297—*H. C. Burson vs. J. E. Adamson et al.—Decided May 26, 1930.*

Facts.—This was an action to recover losses sustained by the plaintiff as a result of the alleged fraud, deceit, and conversion of his property by the defendants. The complaint originally embodied three separate causes of action for the one wrong. To the complaint, the defendant filed a motion to make more specific and certain. This motion was allowed and an order of court was also had to make the plaintiff elect as to which of the causes of action he would pursue. To the plaintiff's bill of particulars, the defendant filed a motion to strike the bill from the files, and to dismiss the complaint because the bill of particulars did not set out the information which the court required, and for the further reason that the bill of particulars was a sham pleading. Thereafter, the plaintiff filed an amended complaint. The defendant moved to strike the amended complaint on the grounds that the court had not granted leave to amend, and that the amended complaint was a sham pleading, and also that in no sense did it comply with the order of the court to make more specific, it being ambiguous and merely a repetition of the original complaint. The court, thereupon, of its own motion, dismissed the action without prejudice.

Held.—1. The plaintiff, by compliance with the order to elect which of his causes of action he would pursue, waived the adverse ruling on this point. The court, however, infers that the plaintiff need not have made the election.

2. When the plaintiff complied with the order to make more specific and certain, he waived any error that might have existed in granting the order. "All objections to rulings on motions or demurrers attacking a complaint, except as to jurisdiction and want of facts are waived by answering over." Williams vs. Smith 76 Colo. 151 and Erisman vs. McCarty 77 Colo. 289, wherein there is announced the doctrine that error, if any, in overruling a demurrer to a complaint upon the ground of insufficiency of facts to constitute a cause of action is waived by answering over, are expressly overruled.

3. By filing his amended complaint, the plaintiff waived

error, if there was error, on the part of the court in striking the bill of particulars.

4. An amended complaint should not be filed without leave of the court.

Judgment Affirmed.

RAPE—EVIDENCE—OUTCRY — DELAY—NO. 12572—*Losasso vs. People of the State of Colorado—Decided April 7, 1930.*

Facts.—Losasso was convicted of statutory rape. The evidence indicated that the offense was committed in May, 1929, that there was no outcry by the girl, and that the information was not filed until the following October. The complaining witness testified variously that the offense was committed May 9, May 16, and April 16. Losasso's counsel contends that the delay in prosecution and the contradictions in the testimony so weakened the case of the prosecutor that the facts are insufficient to support the verdict.

Held.—This was a verdict rendered on conflicting evidence and must stand.

Judgment Affirmed.